Cheah Cheng Hoc & Ors v Liew Yew Tiam & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–505 OF 1995
JAMES FOONG J
11 FEBRUARY 2000

Legal Profession *— Professional privilege — Communication between solicitor and client — Client suing solicitor — Whether privilege apply to litigation between solicitor and client — Solicitor's witness disclosed confidential communication during examination-in-chief, whether privilege waived*

Tort *— Defamation — Libel — Defence — Failure to prove libel statements were substantially true, whether justification proved — Publication made with malice, whether defence of qualified privilege proved*

The plaintiffs were advocates and solicitors practising under the name and style of M/s Cheah Teh & Su ('CTS'). They claimed that the defendants by two letters ('the letters') written by the defendants' solicitors, M/s Wee Choo Keong & Faaiz ('M/s Wee Choo Keong') dated 15 August 1995 and 18 August 1995 respectively had defamed them. The plaintiffs claimed that the words contained in certain paragraphs of the letters meant and understood to mean that the plaintiffs were fraudulent in their conduct, breached their professional duty of care to the defendants, dishonest, untrustworthy, attempted or conspired to defraud the defendants, and not fit to be advocates and solicitors. The defendants pleaded the defences of qualified privilege, fair comment which was made in good faith without malice; and justification. The defendant also raised a preliminary issue that virtually all the evidence given and documents tendered by the plaintiffs in support of their case were inadmissible because of legal professional privilege. These related to or were connected with communication between advocate and client or legal professional advisor and client, and therefore inadmissible under ss 126,128 and 129 of the Evidence Act 1950 when the defendants, as clients of the plaintiffs, did not give their express consent for such disclosure. Further, it was argued that the first defendant should not be compelled to disclose any further confidential communication during the continuation of the trial. The plaintiffs submitted that the legal professional privilege did not apply to litigation between lawyer and client since there was no disclosure of communication in a solicitor-client relationship; the parties being well aware of the communication themselves, much unlike a demand by a third party for such disclosure.

Held, finding the defendants liable to the plaintiffs for defamation:

(1) Section 126 of the Evidence Act 1950 declares that no advocate shall at any time be permitted to 'disclose' any privilege communication. If there was no disclosure then this provision

would not apply. There could be no disclosure of such communication when the person seeking to prevent it from disclosure knew of the communication and was preventing it from exposure from a person whom he shared this communication with in a solicitor-client relationship in an action brought by such person against him where such communication was relevant to the issue. In such a situation, this legal professional privilege could not apply. In the present case, there was no dispute that the plaintiffs were at one time advocates of the defendants. The communications which the defendants sought to prevent disclosure were those covered under solicitor-client relationship. The plaintiffs were suing the defendants where those communications were relevant to the issue. Under such circumstances, the defendants were not entitled to claim legal professional privilege under s 126 of the Evidence Act 1950 (see pp 217I–218G).

(2) On the second limb of the defendants' contention that they should not be compelled to disclose confidential communication under s 129 of the Evidence Act, the first defendant had, by her own accord during her examination-in-chief, disclosed and referred to most of the confidential communication. When this happened, her privilege to the protection from disclosure of such communication was waived under the provision of s 129. She could be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which she had given (see p 218G–I).

(3) The subject matter in the defamatory statements had no public interest. It concerned only the purchaser, its solicitors, the vendors (which included the defendants), their present and former solicitors and the lawyers acting for the financial institutions which granted the loan to finance the purchase of the property. This was sufficient to justify the court in dismissing the defence of fair comment (see p 219D–E).

(4) In a plea of justification, the defendant must prove that the statement published is substantially true. Slight inaccuracies in one or more of its details will not prevent the defendant from succeeding in this defence. It is sufficient to prove the main charge or the sting of the main charge or the gist of the libel is true. In the present case, the main charge or the gist of the libel was that based on the accusations, the defendants concluded that the plaintiffs conspired with others to defraud them in the land transaction. The court found that there was no substantial in virtually all the accusations. Therefore, the gist of the libel was untrue and thus the plea of justification could not succeed (see pp 219E–F, 223F–G).

(5) The defence of qualified privilege will be lost if the occasion which gives rise to it is misused, ie if publication is made with malice.

The burden of proving malice is on the plaintiff. In the present case, the court found that there were no grounds for the defendants to base their belief in the truth of the accusations. The accusations were created with the objective of terminating the agreements in order to extract more money from the purchaser. Such motive of the defendants in using those untrue accusations implied malice on their part. The court found that the plaintiffs had proved malice and the defendants could not succeed in the defence of qualified privilege (see pp 224C, 225D–G).

[Bahasa Malaysia summary

Plaintif-plaintif adalah peguamcara dan peguambela yang mengamal di atas nama Tetuan Cheah Teh & Su ('CTS'). Mereka mendakwa bahawa defendan-defendan melalui dua surat ('surat-surat tersebut') yang ditulis oleh peguam defendan, Tetuan Wee Choo Keong & Faaiz ('Tetuan Wee Choo Keong') bertarikh 15 Ogos 1995 dan 18 Ogos 1995 masing-masing telah memfitnah mereka. Plaintif-plaintif telah mendakwa bahawa perkataan-perkataan yang terkandung di dalam perenggan-perenggan tertentu surat tersebut bermaksud dan difaham sebagai bermaksud bahawa plaintif-plaintif berkelakuan secara fraud, telah memecah tugas profesional kewajipan berjaga-jaga kepada defendan-defendan, tidak jujur, tidak boleh dipercayai, telah cuba dan berkomplot untuk melakukan fraud terhadap defendan-defendan, dan tidak layak untuk menjadi peguamcara dan peguambela. Defendan-defendan telah memplid pembelaan perlindungan bersyarat, komen berpatutan yang telah dibuat dengan suci hati tanpa niat jahat dan justifikasi. Defendan juga membangkitkan isu permulaan bahawa semua keterangan yang diberikan dan dokumen-dokumen yang dikemukakan oleh plaintif-plaintif untuk menyokong kes mereka adalah tidak boleh diterimamasuk oleh kerana perlindungan profesion guaman. Ia adalah berkaitan atau bersangkut-paut dengan komunikasi antara peguam dan anak guam atau penasihat undang-undang profesional dan anak guam, dan oleh itu tidak boleh diterima masuk di bawah ss 126, 128 dan 129 Akta Keterangan 1950 apabila defendan-defendan sebagai anak guam-anak guam kepada plaintif-plaintif, tidak memberikan persetujuan nyata untuk pendedahan sedemikian. Seterusnya, adalah dihujahkan bahawa defendan pertama tidak patut dipaksa untuk mendedahkan sebarang komunikasi rahsia selanjutnya semasa perbicaraan bersambung. Plaintif-plaintif telah berhujah bahawa perlindungan profesion guaman tidak terpakai kepada litigasi antara peguam dan anak guam oleh kerana tiada pendedahan komunikasi di dalam hubungan peguam dan anak guam; di mana pihak-pihak sedar akan komunikasi itu sendiri, dan bukan seperti tuntutan daripada pihak ketiga untuk pendedahan sedemikian.

Diputuskan, mendapati bahawa defendan-defendan bertanggungan kepada plaintif-plaintif untuk fitnah:

(1) Seksyen 126 Akta Keterangan 1950 menyatakan bahawa peguam tidak dibenarkan untuk 'mendedahkan' sebarang komunikasi terlindung pada bila-bila masa sekalipun. Tidak terdapat sebarang pendedahan komunikasi sedemikian apabila pihak yang memohon untuk menghalangnya daripada didedahkan tahu mengenai komunikasi tersebut dan menghalangnya daripada terdedah daripada seseorang yang beliau mengkongsi komunikasi tersebut di dalam hubungan peguam-anak guam di dalam tindakan yang dibawa oleh orang sedemikian terhadapnya apabila komunikasi tersebut adalah berkaitan kepada isu tersebut. Di dalam situasi begini, perlindungan profesion guaman tidak terpakai. Di dalam kes ini, tidak dipertikaikan bahawa plaintif-plaintif pada suatu masa tertentu adalah peguam-peguam defendan-defendan. Komunikasi yang defendan-defendan cuba untuk menghalangnya daripada didedahkan adalah diliputi oleh hubungan peguam-anak guam. Plaintif-plaintiif telah mendakwa defendan-defendan di mana komunikasi-komunikasi tersebut adalah berkaitan kepada isu. Di dalam keadaan sedemikian, defendan-defendan tidak berhak untuk menuntut perlindungan profesion guaman di bawah s 126 Akta Keterangan 1950 (lihat ms 217I–218G).

(2) Berkenaan dengan hujahan bahagian kedua defendan bahawa mereka tidak patut dipaksa untuk mendedahkan komunikasi rahsia di bawah s 129 Akta Keterangan, defendan pertama telah, dengan persetujuannya sendiri semasa pemeriksaan utama, mendedahkan dan merujuk kepada kebanyakan daripada komunikasi rahsia tersebut. Apabila ini berlaku, keistimewaannya untuk dilindungi daripada pendedahan sedemikian telah diketepikan di bawah peruntukan s 129. Beliau boleh dipaksa untuk mendedahkan sebarang komunikasi yang mahkamah anggap perlu diketahui untuk menerangkan sebarang keterangan yang beliau telah berikan (lihat ms 218G–I).

(3) Perkara subjek di dalam kenyataan-kenyataan fitnah tidak mempunyai kepentingan awam. Ia adalah berkaitan dengan pembeli, peguamnya, penjual (yang termasuk defendan-defendan), peguam semasa dan bekas peguam dan juga peguam-peguam yang mewakili institusi kewangan yang memberikan pinjaman terebut untuk membiayai pembelian harta tanah tersebut. Ini adalah mencukupi untuk menjustikasikan mahkamah di dalam menolak pembelaan komen berpatutan (lihat ms 219D–E).

(4) Di dalam pembelaan justifikasi, defendan mestilah membuktikan bahawa kenyataan yang diterbitkan adalah sebahagian besarnya benar. Ketidaktepatan yang sedikit di dalam satu atau lebih butir-butir tidak akan menghalang defendan daripada berjaya di dalam

pembelaan ini. Adalah mencukupi untuk membuktikan dakwaan utama atau pokok persoalan dakwaan utama atau inti pati libel itu adalah benar. Di dalam kes ini, tuduhan utama libel tersebut secara ringkas adalah berdasarkan fitnah-fitnah tersebut, defendan-defendan telah menyimpulkan bahawa plaintif-plaintif telah berkomplot dengan orang lain untuk melakukan fraud terhadap mereka di dalam transaksi tanah. Mahkamah mendapati bahawa tidak terdapat asas di dalam semua pengataan-pengataan tersebut. Oleh itu, inti pati libel tersebut adalah tidak benar dan pembelaan justifikasi tidak boleh berjaya (lihat ms 219E–F, 223F–G).

(5) Pembelaan perlindungan bersyarat akan hilang jika keadaan di mana ia bangkit telah disalah guna, iaitu jika penerbitan dibuat dengan niat jahat. Beban untuk membuktikan niat jahat adalah di atas plaintif. Di dalam kes ini, mahkamah mendapati bahawa tidak terdapat alasan-alasan untuk defendan-defendan untuk mendasarkan kepercayaannya kepada kebenaran pengataan-pengataan tersebut. Pengataan-pengataan tersebut telah direka dengan bertujuan untuk menamatkan perjanjian-perjanjian untuk mendapatkan lebah banyak wang daripada pembeli. Motif sedemikian di pihak defendan di dalam menggunakan pengataan-pengataan yang tidak benar menyiratkan niat jahat di pihak mereka. Mahkamah mendapati plaintif-plaintif telah membuktikan niat jahat dan defendan-defendan tidak boleh berjaya di dalam pembelaan perlindungan bersyarat (lihat ms 224C, 225D–G).]

Notes

For a case on communication between solicitor and client, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1642.

For cases on libel generally, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 165–230.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142 (refd)

Bullock v Corry & Co (1878) 3 QBD 356 (refd)

CS Wu v Wang Look Fung [1981] 1 MLJ 178 (refd)

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445 (refd)

Horrocks v Lowe [1974] 1 All ER 662; [1975] AC 135 (refd)

Maidstone Pte Ltd v Takenaka Corp [1992] 1 SLR 772 (refd)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun [1995] 2 MLJ 493 (refd)

Rev Fr Bernad Thattil v Ramachandran Pillai (1987) CRI LJ 739 (refd)

Legislation referred to

Evidence Act 1950 ss 126, 128, 129

Navaratnam (*Chandran* with him) (*Saheran, Woon & Navaratnam*) for the plaintiffs.

Sulaiman bin Abdullah (*Wee Choo Keong* with him) (*Wee Choo Kwong & Faaiz*) for the defendants.

James Foong J:

The plaintiffs' claim

The plaintiffs are advocates and solicitors practising under the name and style of M/s Cheah Teh & Su ('CTS') in Kuala Lumpur. They claim that the defendants by two letters ('the letters') written by the defendants' solicitors, M/s Wee Choo Keong & Faaiz ('M/s Wee Choo Keong') dated 15 August 1995 and 18 August 1995 respectively have defamed them.

Background

Before I proceed to set out the alleged defamatory statements in the letters it is necessary to explain the background leading to the issue of the letters.

The first defendant is the matriarch of a Chinese family of eight children — three boys and five girls. Members of this family, through holding companies and by themselves, owned 13 pieces of land at Jalan Imbi, Kuala Lumpur. For ease of reference, I shall refer to them jointly as 'the vendors'. For these lands which adjoined each other I shall collectively refer to them as the 'said property'. Part of the said property were charged to banks, but due to differences among family members the bank loans were not repaid resulting in foreclosure actions by the banks. CTS were engaged, principally by the first defendant, to defend these actions and to negotiate with these bankers for a settlement of the debts with anticipated proceeds from the sale of the said property. At that material time there was a demand for the said property, probably due to its location. One such interested party was Kim Huat Engineering Sdn Bhd ('Kim Huat') who agreed to buy it for RM30m. For this deal, Kim Huat paid a sum of RM300,000 in consideration for an option to purchase. In this option, there was a clause to allow both the purchaser and the vendors to opt out of this sale and purchase by a forfeiture of the consideration or a payment of a penalty of a sum equal to the consideration respectively.

Soon after the granting of this option, a more attractive offer was received. This new party was introduced by the first defendant's son — Tony. This new potential buyer offered to purchase the said property for RM34.8m despite being made aware of the complications that might arise by the necessity to terminate Kim Huat's deal.

At the first meeting held with this new group of potential purchaser, the first defendant was present. According to her she was introduced to two

persons by the name of Michael Leong and Francis Lee. These two, according to her, held themselves out to be from a public listed company known as Chongai Corporation Bhd ('Chongai'). As the new purchase price was alluring, the vendors of the said property decided to terminate the option granted to Kim Huat and sell the said property to the new purchaser. Lawyers were called in to draft the sale and purchase agreement to the new purchaser. At the insistence of the first defendant, CTS was engaged by the defendants to act for them in this transaction. The three sons and one other daughter having refused to join in this appointment, retained another firm of solicitors by the name of M/s Hishamuddin & Lee ('M/s Hishamuddin') to act for them. So for this sale, there were two firms of solicitors acting for the vendors. Acting for the purchaser was the legal firm of M/s Paul Ong & Co ('M/s Paul Ong'). Representing the financiers who gave the loan to the purchaser to complete this purchase was another law firm called M/s Kumar Jaspal Quah & Aishah ('M/s Kumar').

Due to the large number of vendors, a few sale and purchase agreements ('agreements') were executed. The purchaser named in all these agreements was one Madam Yeo Meu Siang ('Md Yeo'). Ten percent of the purchase price was paid at the time when the agreements were executed. For the amount which the defendants were entitled, it was paid to CTS. Upon receipt of this, CTS forwarded this amount to the banks which had instituted foreclosure proceedings in an attempt to delay the force sale of certain parts of the said property.

Almost simultaneous to the vendor's consent to sell the said property to this new group, a letter was sent to Kim Huat informing Kim Huat that the option to purchase was terminated with the vendors agreeing to pay the penalty. Kim Huat reacted by lodging a caveat on the said property. CTS were engaged, on the instructions of the first defendant, to remove this encumbrance. The third plaintiff was charged to handle this matter. An application was filed in the KL High Court to set aside this Kim Huat's caveat. After some adjournments this application was eventually heard, and on 19 May 1995 judgment was delivered. The first and second defendants were present in court on that particular day but since the matter was heard in chambers they waited outside while the third plaintiff received the decision in the judge's chamber. The court ordered Kim Huat's caveat be removed, with damages to be assessed. But immediately after this decision was pronounced, Kim Huat's counsel applied to the same judge for a stay of execution pending an appeal to the Court of Appeal. This was granted. When the third plaintiff emerged from the judge's chambers the first and second defendants noticed that the third plaintiff was unhappy. According to these defendants, the third plaintiff never informed them of the successful stay of execution application of Kim Huat; only that the defendants had won their case and the caveat was to be removed. This of course is firmly denied by the third plaintiff. Eventually, after some negotiations that took place subsequently, Kim Huat withdrew the caveat voluntarily on 19 June 1995.

Under the terms of the agreements: (a) the completion of the sale and purchase was six months from the date of the agreements provided that

consent from the Foreign Investment Committee ('FIC') was obtained within this period; (b) it was the responsibility of the purchaser to apply for the FIC approval within 14 days from date of the agreements; (c) in the event of FIC approval not obtained within this specified period the agreements shall lapse; (d) if however FIC was obtained within the time stipulated but there existed a caveat on the said property which would prevent the registration of the transfer then an extended completion date of 12 months from date of the agreements was allowed; (e) if by this time the caveat was still not removed there would be a 'further extended period' of 24 months from date of the agreements; (f) after this, if the caveat remained, the agreements should terminate. It was also agreed that if the caveat was removed during the 'extended period' or the 'further extended period' the purchaser should pay the vendors the balance of the purchase price within two days and seven days respectively from date of the removal of the caveat.

Calculating from the date of the agreements, the completion date was 23 April 1995. But by 8 April 1995, FIC approval was still not secured. Fearing the possibility that the sale may be terminated, the purchaser called for a meeting with the vendors. It was attended by the first defendant, accompanied by either the second or third defendant; the three sons of the first defendant; Mr Kenny Ng and Ms Needle, solicitors from M/s Paul Ong; Michael Leong and Francis Lee; and the second plaintiff, joined later by the first plaintiff. At this meeting an agreement was reached between the parties to allow the completion date to be changed to 23 July 1995, ie nine months from date of agreements provided the caveat on the said property was removed. According to the plaintiffs, this was agreed upon in consideration of the purchaser paying to the vendors an interest of 12% pa on the balance of the purchase price from date of removal of caveat to new date of completion. This issue on the payment of interest is, however, vehemently denied by the defendants; they claim that the question of interest was never raised at this meeting.

After the agreement was reached, the first and the second or third defendants left the meeting. The lawyers remained to draft the new terms. Soon they realised that in the event of FIC approval obtained on or near the completion date then there would be insufficient time to draw down from their financiers to pay the balance of the purchase price. To overcome this, the purchaser's lawyers suggested a buffer period of one month to pay the balance of the purchase price from the date of FIC approval or 23 July 1995, whichever came later. Instead of getting their clients' prior approval on this new proposal, the plaintiffs' sent out a letter to M/s Paul Ong confirming acceptance of the fresh terms, including the one month buffer period over and above the other provisions agreed by the vendors and purchasers at the meeting. A carbon copy of this letter was sent to the defendants. When the first defendant came to know of this additional term, she was very upset. She protested violently to the first plaintiff over the phone and refused to consent to this. Because of this, another meeting was called for on 21 April 1995.

The 21 April 1995 meeting was attended by the first plaintiff, first and second defendants, the first defendant's three sons and their lawyer, Kenny Ng and Ms Needle of M/s Paul Ong, Michael Leong and Francis Lee. On this occasion, the negotiation was dominated by the first defendant and Michael Leong arguing over the amount of interest and over what period it should be paid by the purchaser for the extended period of completion of the sale. In the end an agreement was reached. The completion date was extended for a period of three months to 23 July 1995, and as consideration for this, the purchaser shall pay to the vendors interest at 8% pa on the balance of the purchase price for this extended period.

Sometime in April 1995 the purchaser nominated a company called Metro Jelita Sdn Bhd ('Metro') to accept the transfer of the said property on completion date. The vendors agreed to this and this was evidenced by a deed of nomination signed by all the vendors. After this was completed, in June 1995, an advertisement appeared in a national newspaper stating that Metro was offering for sale certain types of building to be erected on the said property. When the first defendant, who was then in London, came to know of this, she immediately telephoned the second plaintiff on 26 June 1995 to voice her displeasure and concern over this new development since the balance of the purchase price was still not fully settled by the purchaser. Her instruction to the second plaintiff was to issue a letter to Metro demanding payment of 50% of the purchase price if Metro wished to continue with its attempt to sell the proposed building to be built on the said property to third parties. When the first defendant returned to Malaysia on 29 June 1995 she discovered that CTS had not carried out her instructions to write the said letter of demand to Metro. In her position as a managing director of one of the vendors she issued a letter of demand (the contents of which were similar to that of her instructions to the second plaintiff earlier), to M/s Paul Ong, solicitors for the purchaser. According to the plaintiffs, though they admitted that they received the instructions from the first defendant to send out such a letter to the purchaser, they did not proceed with it because they were awaiting further instructions after the draft of such letter was forwarded to the defendants.

Unable to accept insubordination by the plaintiffs, the defendants engaged M/s Wee Choo Keong to act for them. The services of CTS was terminated by the defendants and CTS was requested to forward all relevant documents associated with the sale of the said property to the newly appointed solicitors. At the same time M/s Wee Choo Keong also wrote to CTS with instructions to CTS not to accept from the purchaser the balance of the purchase price. CTS responded with a reply demanding that M/s Wee Choo Keong must undertake to pay CTS 50% of the solicitor's scale fees for work done on the sale of the said property. In retaliation M/s Wee Choo Keong insisted that CTS provided detailed accounts of all work done and the amount of fees so charged as well as the immediate supply of all relevant documents associated with the sale of the said property. There was urgency in the demand of the latter for the new completion date was then drawing near.

A The first defendant then testified that on 13 July 1995, Francis Lee called at her house 'to discuss and settle the problems in the land transaction', probably concerned over the instruction of the defendants to CTS not to accept the balance of the purchase price. When told that he could not be entertained because the relevant documents were still in the hands of CTS, who refused to release them to the defendants' new B solicitors, Francis Lee informed the first defendant that he would instruct CTS to release these papers immediately. On 13 July 1995, CTS did release the documents to M/s Wee Choo Keong in consideration of a lien of RM84,060.97 belonging to the defendants which was in CTS clients' account.

C On 15 August 1995 and 18 August 1995 respectively, in response to M/s Paul Ong's letter demanding completion of the sale of the said property, M/s Wee Choo Keong wrote the letters to M/s Paul Ong. It is in certain specified paragraphs of these letters that the plaintiffs are alleging that they are defamed. These are:

D On the letter of 15 August 1995:

(1) It now transpired that MJ (Metro) was never a subsidiary of CCB (Chongai) or in anyway connected to CCB. Therefore, our clients were misrepresented by Michael, Francis, your Kenny Ng and M/s Cheah Teh & Su ('CTS').

(2) On 24 October 1994, MJ paid to CTS the sum of RM3.48m when the E S & P was executed and CTS never revealed this fact to our clients. Our clients only discovered this fact in July 1995.

(3) Under the S & P, your clients had to apply for FIC approval within 14 days but your clients did not apply within the said 14 days period. At the material time, our clients did ask Mr Cheah of CTS about their rights over failure in making the FIC application within 14 days as stipulated F under the S & P but Mr Cheah of CTS avoided the issue and did not advise our clients of their rights under the S&P.

(4) On 8 April 1995, Mr Cheah of CTS wrote to you stating among other things that your clients had to pay 12% interest per annum on the outstanding purchase price as consideration for the granting of extension time for the completion date. On 12 April 1995, you wrote a letter to G CTS enclosing therein a draft Supplemental Agreement wherein your clients have agreed to pay 12% interest per annum in consideration of our clients granting the extension of time. The content of the draft Supplemental Agreement containing the 12% was never shown to our clients by CTS at any time.

(5) On 21 April 1995, a meeting was held at M/s Lee Hishamuddin's office H ('LH') between our clients, Michael, your Kenny Ng, Mr Cheah of CTS and Mr Ng Leong Huat of LH. At this meeting, our clients have demanded for 10% interest as consideration for granting the extension of time without realising that your clients have already agreed to 12% on 12 April 1995. Mr Cheah of CTS remained silent when our clients demanded for 10%. Michael bargained for 8% and Mr Cheah of CTS did not utter a word about the 12%, which your clients have previously I agreed upon. Our clients were misled by your clients (Francis and Michael), your Mr Kenny Ng and Mr Cheah of CTS to agree to the 8% interest when they are entitled to the agreed 12%.

(6) CTS refused to release our clients' documents unless our clients paid them 50% of the 'agreed fees'. We are informed that on 13 July 1995, Francis went to see our clients at their house and clients told him that they are not in the position to discuss/or negotiate anything on this matter because we have not received all the documents from CTS. Francis immediately responded that he will give instructions to Mr Cheah of CTS to release all our clients' documents. Our clients was indeed surprised by this statement. Thereafter, CTS changed their stand and released part of our clients' document.

(7) From the court file on the case no S3-24-963-1994, we note that on 19 May 1995, the private caveat on the abovementioned land lodged by Chua Ah Bah was ordered by the High Court to be lifted and damages to be assessed by the court. There was an oral application for stay of execution by the defendant's solicitors but Mr Su of CTS did not object to the application for stay of execution knowing very well that under the S&P, the balance of the purchase price had to be paid within 14 days after the caveat is lifted.

(8) On 21 July 1995, when we specifically requested for the letter of extension from CTS, CTS did not respond until 25 July 1995.

(9) From the abovementioned facts, it was quite clear there was some close relationship between your clients and CTS because Francis could influence/instruct CTS to release our clients' document to us as CTS refused to do the same earlier.

(10) There was a conspiracy between your clients, Francis, Michael and CTS to defraud our clients in this whole transaction.

On the letter of 18 August 1995:

that the above factors add to our clients' belief of the existence of conspiracy to defraud them on this land transactions.

The plaintiffs' claim that the words in these paragraphs mean and understood to mean that the plaintiffs are:

(1) are fraudulent in their conduct;

(2) breached their professional duty of care to the defendants;

(3) are dishonest;

(4) are untrustworthy;

(5) attempted or conspired to defraud the defendants; and

(6) are not fit to be advocates and solicitors.

And by this, the plaintiffs insist that their reputation had been lowered in the estimation of right thinking members of society, they have suffered injuries to their personal credit, character and reputation as well as in their trade and profession. It has also brought them into hatred, ridicule and contempt. For these, they have suffered hurt, mental distress and anguish. They now seek from this court general and exemplary damages, as well as aggravated damages, which they tagged it at RM5m. Besides, there is a claim for injunction to restrain the defendants and/or their servants from repeating these statements.

Defendants' defences

The defendants' defences as pleaded in their statement of defence are:

(1) the words in the statements do not refer to the plaintiffs or understood to refer or capable of referring to the plaintiffs;

(2) the words do not bear or capable of bearing the meaning as imputed by the plaintiffs;

(3) qualified privilege;

(4) fair comment which was made in good faith without malice; and

(5) justification.

Issues

By the nature of the defences raised the issues for determination are as follows:

(1) whether the words stated in these alleged statements refer to the plaintiffs;

(2) whether the words therein bear and capable of bearing the meaning imputed by the plaintiffs;

(3) and if the first two issues are found to be in the positive, then whether the defendants can succeed on substantive defences of justification, qualified privilege and fair comment.

In order to evaluate these issues, it is necessary to identify each subject matter contained in the alleged defamation. They are:

(1) The plaintiffs had misrepresented to the defendants that Metro was a subsidiary of CCB.

(2) The plaintiffs never revealed to the defendants that Metro had paid a sum of RM3.48m to CTS when the agreements were signed.

(3) CTS did not advise the defendants of their rights under the agreements when the purchaser failed to apply for FIC approval within 14 days from the date of the agreement.

(4) CTS never disclosed to the defendants that the purchaser had agreed to pay 12% interest before the meeting of the 21 April 1995.

(5) The purchaser had influenced CTS to release the relevant documents.

(6) The third defendant did not object to Kim Huat's application for the stay of execution when the decision for the removal of the caveat was granted.

(7) The plaintiffs were late in responding to the defendants' request for the letter granted to the purchaser to extend the completion date of the sale of the said property.

Legal professional privilege

Before I set out to analyse the case, there is a preliminary issue that requires elaboration. After the plaintiffs closed their case and just before the first

defendant finished her examination-in-chief, Tuan Haji Sulaiman (counsel for the defendant) raised the issue of legal professional privilege. He insisted that virtually all the evidence given and documents tendered by the plaintiffs in support of their case were inadmissible because of legal professional privilege. These related to or were connected with communication between advocate and client or legal professional advisor and client, and were therefore inadmissible under ss 126, 128 and 129 of the Evidence Act 1950 when the defendants, as clients of the plaintiffs, did not give their express consent for such disclosure. Such evidence, according to him should be expunged. Further, he insisted that the first defendant should not be compelled to disclose any further confidential communication during the continuation of the trial. He reminded this court that this privilege was not lost even at that stage of the proceedings for a communication once privileged 'is always privileged' (per Cockburn CJ in *Bullock v Corry & Co* (1878) 3 QBD 356).

After hearing and reading the submissions of both parties on this issue, I dismissed the defendants' objection. I had assured both parties at the material time that I shall incorporate in my final judgment of this case the grounds for this rejection. It is as follows:

Section 126 of the Evidence Act reads:

> Professional communication
>
> (1) No (Advocate) shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such (advocate) by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment;
>
> Provided that nothing in this section shall protect from disclosure —
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any (advocate) in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the (advocate) was or was not directed to the fact by or on behalf of his client.
>
> Explanation (not applicable in the circumstances of this case and thus not reproduced here).

Then s 128 of the same Act said:

> Privilege not waived by volunteering evidence
>
> If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in s 126; and if any party to a suit or proceeding calls for any such (advocate) as a witness, he shall be deemed to have consented to the disclosure, only if he questions the (advocate) on matters which but for such question he would not be at liberty to disclose.

A And s 129 of the Evidence Act lays down:

> Confidential communications with legal advisers
>
> No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be
B compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

Mr Chandran, counsel for the plaintiffs, in arguing against the application of these provisions in the circumstances of this case, attempted to influence
C me that by an Indian authority of *Rev Fr Bernad Thattil v Ramachandran Pillai* (1987) CRI LJ 739 the strict rule of 'express consent' under s 126 of the Evidence Act can be inferred from 'facts and circumstances' rather than being restricted to be only in 'writing' as decided in *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 at p 447. His objective was to overcome s 126 of the Evidence Act by pointing out that the acts of the
D defendants in affirming an affidavit verifying documents, the filing of a list of documents (the contents of these documents contain the alleged privileged communications), and the examination of the plaintiffs' witness on such communication would imply that the defendants had consented to the disclosure of such communication by the plaintiffs.

E I disagree with this contention. The term used in s 126 of the Evidence Act is 'express consent'. By this, there must be some element of clear, explicit and predetermined intention of the defendants to consent to the plaintiffs in disclosing the privilege communication, not by any indirect or inferred manner. The affirmation of an affidavit and the filing of documents containing the privilege communication were mere processes required by
F the rules and procedure of the courts in getting this case ready for trial. They did not relate directly to the consent to disclose, thus could not be considered as express consent given by the defendants. As for the examination of the plaintiffs' witness on such matter, it was a right granted to the defendants under the law to cross-examine any of the plaintiffs' witnesses on matters which were relevant to the case. In the exercise of this
G right of cross-examination, there was no waiver of the defendants' legal professional privilege, quite unlike the situation provided under s 128 of the Evidence Act 1950. That is when the defendants themselves calling these advocates as witnesses and then questioning them on such privileged communication. But in this case, the advocates were the plaintiffs and their witnesses; the defendants did not call upon them to testify. Thus the
H privilege is not waived.

Mr Chandran then argued that this legal professional privilege did not apply to litigation between lawyer and client since there was no disclosure of communication in a solicitor-client relationship; the parties being well aware of the communication themselves, much unlike a demand by a third
I party for such disclosure.

I was much influenced by this proposition. Section 126 of the Evidence Act declares that no advocate shall at any time be permitted to

'disclose' any privilege communication. If there was no disclosure then this provision would not apply. I was of the view that there could be no disclosure of such communication when the person seeking to prevent it from being disclosed knew of the communication and was preventing it from exposure from a person whom he shared this communication with a solicitor-client relationship, in an action brought by such person against him where such communication was relevant to the issue. In such a situation this legal professional privilege could not apply. Imagine an advocate and solicitor attempting to sue his former client for his fee for work done, and on every occasion when the lawyer attempts to introduce evidence orally or by way of documents to support his case, the client waives legal professional privilege. If this privilege is upheld, then no lawyer can succeed in claiming any fees from a recalcitrant client who refus to pay for work done. I am of the firm opinion that in a situation such as this, there was no disclosure of any communication between the parties to the action to entitle the defendant to use s 126 of the Evidence Act as a protection.

I am not unsupported in my approach on this. In the authoritative words of *Sarkar's Law of Evidence* (15th Ed) at p 2046, the respected author has this to say:

> It has frequently been held that the rule as to privileged circumstances of attorneys does not apply when litigation arises between attorney and client, and when their communications are relevant to the issue (*Naive v Baird* 12 Ind 318); and if it is claimed that the attorney has an interest in the pending litigation, for instance that his fee is contingent on the result, he may be required to state such fact, and the communications with his client relating thereto (*Eastman v Kelly* 1 NYS 866).

In this case there was no dispute that the plaintiffs were at one time advocates of the defendants. The communications which the defendants sought to prevent from disclosure were those covered under solicitor-client relationship. The plaintiffs were suing the defendants in respect of communications that were relevant to the issue. Under such circumstances, the defendants were not entitled to claim legal professional privilege under s 126 of the Evidence Act.

On the second limb of the defendants' contention that they should not be compelled to disclose confidential communication under s 129 of the Evidence Act, I wish to highlight the fact that the first defendant had, by her own accord during her examination-in-chief, disclosed and referred to most of the confidential communication. When this happened her privilege to the protection from disclosure of such communication was waived under the provision of s 129 of the Evidence Act. She could be 'compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he (she) has given but no others'. By this, I could not entertain this defendants' second request.

Analysis

Not referring to the plaintiffs & words do not bear the meaning imputed

From the contents of the Tuan Haji Sulaiman's submission, I note that there is absolutely no reference to the contention that the words in the alleged defamatory statements do not refer to the plaintiffs and the words therein do not bear and/or capable of bearing the meaning imputed by the plaintiffs. This must be an indication that the defendants are abandoning these defences. In any event, even if this is not the case, I find these allegations are without merits. A mere reading of these statements itself is sufficient to find that they refer to the plaintiffs directly and imputes those meanings as asserted by the plaintiffs.

Fair comment

The concentration of Tuan Haji Sulaiman's submission centres on the substantive defences of justification and qualified privilege. Even fair comment is left unattended. I presume this is adopted because of the absence of the element of public interest required to ensure success of this defence. In my opinion the subject matter in the defamatory statements has no public interest. It concerns only the purchaser, its solicitors, the vendors (which includes the defendants), their present and former solicitors and the lawyers acting for the financial institutions which granted the loan to finance the purchase of the said property. This is sufficient to justify the dismissal of this defence of fair comment.

Justification

In a plea of justification, the defendant must prove that the statement published is substantially true. Slight inaccuracies in one or more of its details will not prevent the defendant from succeeding in this defence. It is sufficient to prove the main charge or the sting of the main charge or the gist of the libel is true — see Gatley on *Libel & Slander* (9th Ed) at para 11.7.

Having determined the principle to be applied, I shall now proceed to examine separately each of the accusations raised in the said letters and then evaluate them as a whole to decide on whether the gist of the libel is true.

Purchaser was a subsidiary of CCB

Metro was to be the nominated registered owner of the said property upon the completion of the sale. Metro was nominated by Md Yeo, as was allowed under the agreements. This nomination was even consented to by the vendors when they executed a deed of nomination for such purpose. Now the defendants accuse the plaintiffs of misrepresenting to them that Metro was a subsidiary of CCB or connected with this public listed company. But how could this be when such representations were made directly to the first defendant by Michael Leong and Francis Lee. According to the first defendant, Michael Leong and Francis Lee personally represented to her that they were from or associated with CCB at the first

meeting she had with the new group of purchasers. Neither the plaintiffs nor any one from CTS were presented when this was made. They were not even invited to attend this meeting. The plaintiffs only came to know of such representation from the vendors. This is revealed from the admission of the first defendant when she said under cross-examination that 'CTS informed me that Francis and Michael were representing Chongai Corp Bhd through information given by my son and CTS did not tell me this directly'. Secondly, there is also evidence that it was the first defendant who told the plaintiff of this representation rather than the other way round. This is from the testimony of the second defendant when she said 'My mother told Cheah (first plaintiff) that Francis was from Chongai'.

Further, I cannot see the significance of this accusation. The agreements were already executed and the 10% of the purchase price was paid. There was no protest to Md Yeo being the named purchaser. All that was required of the defendants at that material time was to wait for the payment of the purchase price. If the purchaser failed to fulfil this obligation to pay, then the deposit would be forfeited. There was no reason to take issue on this representation; not when the agreements had been signed. If it was before, then it would be a different matter.

I do not believe that there is any truth in this accusation by the defendant. I suspect that it was manufactured to create a ground for the defendant to terminate the agreements with the purchaser at the time when this accusation was levied.

Failure to disclose on the deposit paid by the purchaser

The deposit for the purchase of the said property was received by CTS before the defendants signed the agreements. The letters accused the plaintiffs of not informing the defendants when this sum was paid. According to the defendants they only came to know of this in July 1995.

I find no truth in this accusation. Firstly, the agreements itself acknowledged such payment being made upon execution of the agreements. These agreements were read over by the defendants before they executed it. So the defendants must have known that this deposit was made to CTS on execution of the agreements. Secondly, from the evidence advanced, and by my observation of the first defendant when she testified before me , I find that the first defendant is a very careful woman who is well-versed in commercial affairs. In fact, as revealed by evidence, she was the main player in the entire sale transaction and matters related to it. All parties so involved seemed to abide by her wishes. She and other defendants were monitoring this sale with great concern and circumspect at all material times. The price of the said property was sky rocketing and the first defendant intended to reap maximum benefit out of it. She was keeping a hawk's eye over the entire transaction. Money was also urgently required at that time to pay the banks to forestall any force sale of any of the lands forming the said property. For if any of the lands were sold by public auction then the value of the said property would drop substantially for it no longer formed a singular large piece. So it was of utmost importance to

A the defendants that the deposit, when received, must be immediately paid to the banks. This was duly carried out by the plaintiffs, and the plaintiffs could only have acted in this manner with the defendants having knowledge that the payment of the deposit was made when the agreements were actually executed. When this was the case, then the defendants must have known that the money was paid when they signed the agreements, and not
B at the subsequent date.

Failure to advise on the late application of FIC by the purchaser

The first plaintiff testified that he did advise the defendants of their rights to terminate the agreement due to the purchaser's failure to apply for FIC
C approval within 14 days from date of the agreements. Added to this advice was his view that the court may refuse to terminate this sale for reason that this was not a fundamental breach of the contract. This the defendants deny. They have accused the first plaintiff of brushing them off when they sought his advice on this matter.

D I do not believe that this accusation of the defendants can be true. Judging the character of the first defendant by her actions before, during and after the said property was sold and transferred, she was not one who could be easily pushed over. She was a shrewd, demanding and aggressive woman who would never allow any pursuit of hers to be stalled or brushed over by any non-committal or indifferent comment, such as the one she
E accused the first plaintiff of. Despite her lack of command in the English Language, I do not think that she would let any advantage in her favour slip by without being aware of the consequences of terminating the agreements at this stage of the sale. Stacked against her then were the banks with their orders for sale, the uncertainty of succeeding in such termination as
F experienced by the Kim Huat's deal, and the proximity of time when the balance of the purchase price would be paid. I believe that the defendants had abandoned an attempt to terminate the agreements only after having considered the first plaintiff's relevant advice. When this was the case, then there must be an advice rendered by the first plaintiff.

G *Failure to forward the draft supplemental agreement & the non-disclosure of the 12% interest*

The plaintiffs admitted in evidence that they did not obtain the defendants' approval on the term relating to the granting of a buffer period of one month prior to their letter to M/s Paul Ong dated 8 April 1995. But this was
H immediately ratified by the plaintiffs in their subsequent letter to M/s Paul Ong dated 13 April 1995. There, they told M/s Paul Ong to hold on to the supplemental agreements which contained this term (as well as others which were already agreed upon) for they had yet to obtain consent from their clients for this new additional condition. This letter was copied to the defendants. It was on these draft supplemental agreements that the
I defendants were taking issue when they accused the plaintiffs in the letters for not forwarding these documents to them. The relevance? The defendants claim that if these supplemental agreements were shown to

them, they would not have agreed to a lower interest rate of 8% pa to be paid by the purchaser at the meeting of the 21 April 1995 since the purchaser had already agreed to 12% interest.

I find this accusation untrue. The defendants were already aware that the purchaser had agreed to 12% interest by the plaintiffs' letter to M/s Paul Ong dated 8 April 1995. This letter was copied to the defendants before the meeting of the 21 April 1995. In para 1(c), it declares as follows:

> Purchaser shall pay vendors interest on the balance at 12% per annum from date of removal of caveat, to the completion date.

Here 12% interest was revealed to the defendants and since the defendants have never denied receiving this letter nor disclaimed knowledge of its contents, they must have known of this agreed 12% interest. So for this, they cannot claim that they were not enlightened on this agreed interest prior to the meeting of 21 April 1995.

Further, after careful perusal of the terms agreed upon by the parties at the meeting on 8 April 1995 and 21 April 1995, I cannot find any justification for the defendants to assert that they had negotiated for less interest. In fact they had gained. Originally, under the agreements the period for completion was for 6 months from date of the agreements. On 8 April 1995 it was extended to 9 months from date of agreements with 12% interest on the balance of purchase price from date of removal of caveat to the extended completion date. Then at the 21 April 1995 meeting it was at 8%pa. But this was to be paid irrespective of whether the caveat was removed or not. The 12% pa interest, which I have found the defendants were aware of, commenced only on the day the caveat was removed. So by this deduction the defendants had gained more than what they had agreed earlier on 8 April 1995. This advantage must have been known to the defendants, otherwise Michael Leong and Francis Lee would not even have negotiated with the defendants at all at the second meeting. The purchaser stood to lose more under this new term.

Release of documents

The defendants had claimed in the letters that the sudden release of the relevant documents by CTS to their new solicitors was prompted by the instructions of Francis Lee to CTS. This, the plaintiffs have denied. The plaintiffs explained that the release of the relevant papers was because they discovered the defendants had sufficient money deposited in the plaintiffs' clients' account that could act as a lien over the payment of their fees. I believe them. The allegation of the defendants was a bare allegation. Francis Lee was never called by the defendants to confirm that he gave such instructions to CTS to release the documents immediately. Instead there is an affidavit sworn by Francis Lee which denies this allegation of the defendants. This affidavit was in support of a suit brought by the purchaser for specific performance against the defendants to complete this sale when the defendants attempted to get out of it. With the exposure of these facts, I cannot believe this accusation of the defendants to be true.

A *Third plaintiff did not object to the application for a stay of the execution*

By the defendants' own testimony in court, they have admitted that they were wrong in accusing the third plaintiff for not objecting to Kim Huat's counsel's application for stay of execution after an order for the removal of the caveat was allowed. To reduce the effect of this admission, the
B defendants feebly asserted that the third plaintiff did not oppose to Kim Huat's application for stay 'strongly'. The defendants then explained that they made this accusation in the letters based only on the brief minutes recorded in the court file, not from the judge's note, which reveals otherwise.

C First of all the accusation was not that the third plaintiff had not objected 'strongly'. It accused the third plaintiff for not objecting at all. This of course is absolutely untrue. Secondly, the defendants only consulted the court file minutes when their solicitors were aware that it was insufficient to make such a serious allegation against an advocate and solicitor without perusing the judge's notes. With these revelations, I find no truth in this
D accusation of the defendants.

Failure to forward the letter of extension

By 14 July 1995, CTS had forwarded two bundles of documents to M/s Wee Choo Keong. Then on 21 July 1995 M/s Wee Choo Keong requested
E for the letters of extension of time granted to the purchaser by the vendors. CTS replied on 25 July 1995 that they believe these documents were among those papers sent to M/s Wee Choo Leong earlier. This fact, as it stood, was true, but to consider just this together with other untrue accusations in arriving at a conclusion that the plaintiffs had conspired with others so named is insufficient to justify a plea of justification.

F

Conspiracy

The main charge or the gist of the libel is that based on the above accusations the defendants concluded that the plaintiffs conspired with others so named to defraud them in this land transaction. By my analysis
G above there is no substantial truth in virtually all the accusations. With this, I find the gist of the libel untrue, and therefore the plea of justification unsuccessful.

Qualified Privilege

H As for qualified privilege, the law recognises that if a person has a duty to perform or an interest to protect he can communicate frankly and freely with the other who has a corresponding interest to receive, and any statement made in the course of this is privilege, provided always that it was made in good faith — see Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662. Thus this privilege can only arise if there is a reciprocal or
I common interest between the defendant and the person with whom he makes the communication. This reciprocated common interest occurs 'where the words complained of as defamatory were published in pursuance

of an interest or of a duty, legal, social, or moral to publish them to the person to whom they were published and the person whom they were published had a corresponding interest or duty to receive them', per Hepworth J in *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142 at p 154.

Tuan Haji Sulaiman in his submission attempted to impress upon me that there existed a relationship between M/s Paul Ong and M/s Wee Choo Keong when the said letters were written. M/s Wee Choo Keong was then acting for the defendants, who were vendors of the said property, whilst M/s Paul Ong were for the purchaser. From this relationship there was a common interest and any correspondence between them should be protected by qualified privilege.

By the nature of the plaintiffs' submission, I do not think that they are disputing this. What the plaintiffs are arguing is that the defendants published the defamatory statements with malice. As stated above this defence of qualified privilege will be lost if 'the occasion which gives rise to it is misused, ie in common parlance, if publication is made with malice' — see *Maidstone Pte Ltd v Takenaka Corp* [1992] 1 SLR 772 at p 787. The burden of proving malice is on the plaintiff.

Knowledge of untruth

In his attempt to prove malice on the part of the defendants when making the defamatory remarks, Mr Chandran stressed on the fact the defendants did not have an honest belief in the truth of what they wrote. This alone, if found to be true, is sufficient to prove malice — see para 16.13 in *Gatley on Libel and Slander* (9th Ed).

In order to decide on this, I must be reminded of the test set out by Lord Diplock in *Horrocks v Lowe* [1975] AC 135 at p 150:

> What is required on the part of the defamer to entitle him to the protection of the privilege is the positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it is true or not, he is in this, as in other branches of law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and failed to recognize the cogency of material which might cast doubt on the validity of the conclusions they reached. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a

positive belief that the conclusions they have reached are true. The law demands no more.

I accept all the shortcomings and realities of human nature as spelt out in detail by Lord Diplock above in the defendants. But in this case, the defendants when publishing these statements were without honest belief in their truth as proven from my deliberation on the defence of justification. Take the first accusation in the letters. The plaintiffs were not even invited to the first meeting with the purchaser where Michael Leong and Francis Lee were said to have introduced themselves as representing CCB. These representations by these two persons were in fact made direct to the first defendant. The plaintiffs did not know of this until Tony, the son and one of the vendors, informed them of this. Yet, the defendants accused the plaintiffs of misrepresenting them on this. On the second accusation, again, from the facts exposed I have concluded that the defendants knew at the time when the defamatory statements were published that the deposit was paid before the execution of the agreements. The same finding of untruthfulness goes with the third, fourth and sixth accusations. There is no necessity for me to repeat my deliberations. What is of importance is that there were no grounds for the defendants to base their belief in the truth of the accusations. My belief is that these accusations were created with the objective of terminating the agreements in order to extract more money from the purchaser. This is evidenced by the testimonies of Kenny Ng, who met up with the defendants with the purchaser. At this meeting the first defendant demanded more money and refused to accept anything less. Such motive of the defendants in using these untrue accusations implies malice on their part — see para 16.4 in Gatley on *Libel and Slander* (9th Ed).

Further, soon after the defamation was published there was a demand by the plaintiffs of the defendants for an apology after the plaintiffs had set out all the facts supporting the denial of the accusations. This was entirely ignored by the defendants. The defendants just brushed it aside without even attempting to answer. This act of the defendants lends added support to the existence of malice at the time of publication of the defamation — see *CS Wu v Wang Look Fung* [1981] 1 MLJ 178.

By the reasons stated above, I find the plaintiffs have proved malice and defendants cannot succeed in this defence of qualified privilege.

Finding on liability

With the plaintiffs proving their case and the defendants, defences dismissed I find the defendants liable to the plaintiffs for defamation.

Damages

Besides the reasons given for awarding exemplary and aggravated damages, the Court of Appeal in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 MLJ 493, has also accepted the established principle of evaluating damages based on the following factors:

(1) The position and the standing of the plaintiff. A

(2) The extent of the publication.

(3) The mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel.

(4) The uncertainty undergone in this litigation.

(5) The conduct of the defendants from the time of the libel sown to the very moment of the verdict. B

(6) The absence and refusal of any correction, retraction or apology.

After taking into consideration all these, as well as those laid down for exemplary and aggravated damages expounded in *MGG Pillai*'s case, C I award the following damages:

(1) Against the first defendant a sum of RM500,000;

(2) Against the second defendant a sum of RM300,000;

(3) Against the third defendant a sum of RM50,000; D

(4) Against the fourth defendant a sum of RM150,000.

The sum awarded against the first defendant is more substantial than the other defendants for reason that she was the fugleman in this entire episode of defamation. The others were merely foot soldiers who followed their leader blindly and without thinking despite the fact that they were all more E educated than the first defendant. The second defendant was more of a lieutenant to the first defendant. She was more involved in this wrong than the fourth defendant. As for the third defendant she was entirely out of the country throughout. She merely lent her name. But nevertheless they are all liable. It is only a matter of degree of their involvement which is relevant in the assessment of damages, and it is on this that the quantum of damages F awarded against them is based.

The defamation was made with malice and with ulterior motive to gain certain monetary advantage, ie to terminate the agreements in order to demand more money out of the purchaser. Such motives and actions by the defendants are deplorable, particularly in this instance, when it consists of G the allegation of the plaintiffs in conspiring with others so named to defraud. Such accusation is serious, for if prosecuted and found liable, the plaintiffs may land themselves in jail. The consequence of this defamation must have caused mental anguish and distress to the plaintiffs. The plaintiffs were and are advocates and solicitors where reputation of honesty and integrity is a hallmark in their profession. To attack them on H this vital element is most humiliating and damaging. Fortunately the publication of these defamatory statements were restricted, but still, damage is done.

There was no apology tendered despite request even after the plaintiffs explained in detail of the error committed by the defendants in that there I was no truth in each accusation.

It is for these reasons that I have awarded the amounts stated above.

Besides awarding cost to the plaintiffs, I shall also allow the plaintiffs' request for an injunction to restrain the defendants, their servants and/or agents from further publishing the defamatory statements.

Order accordingly.

Reported by Jafisah Jaafar